IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

WALTER SESSION, *et al*.	§	
Plaintiffs,	§	
	§	No. 2:03-CV-354
v.	§	Consolidated
	§	
RICK PERRY, *et al*.	§	
Defendants.	§	

STATE DEFENDANTS' TRIAL BRIEF

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STATE DEFENDANTS' TRIAL BRIEF

TO THE HONORABLE THREE-JUDGE COURT:

In 2003, for the first time in over a decade, the Texas Legislature passed a congressional redistricting map for the State of Texas. In doing so, the Legislature accepted the *Balderas* Court's invitation to take up the "quintessentially legislative question" of redistricting and passed Plan 1374C. *See* Tex. H.B. 3, 78th Leg., 3d C.S. (2003).

In addition to their mid-decade redistricting claims already briefed on summary judgment, Plaintiffs raise three principal challenges to Plan 1374C. First, they allege that the plan is an unconstitutional racial gerrymander, in violation of the Equal Protection Clause. Second, they allege that it is an unconstitutional political gerrymander, in violation of the Equal Protection Clause. And third, they allege that Plan 1374C violates Section 2 of the Voting Rights Act. The evidence that will be presented at trial does not meet Plaintiffs' burdens on any of these claims, and all three challenges should be rejected.

SUMMARY OF THE ARGUMENT

Plan 1374C is not an unconstitutional racial gerrymander. The evidence will show that the predominant goal of the Texas Legislature was to craft, within the confines of the Voting Rights Act, a plan that increases the number of districts likely to elect a Republican, in order to better conform to the statewide voting patterns in the State of Texas. The evidence will show that the maps were not drawn with race as the predominant factor. Indeed, the district shape and demographics of each challenged district will show them to be within acceptable ranges and not at all bizarre. Furthermore, direct evidence of legislative purpose will prove that politics, not race, was the predominant factor motivating the Legislature's decision to place a significant number of voters within or without a particular district. Moreover, racial identification will be shown to correlate highly with political affiliation, so that the creation of a new Democratic seat in the Valley and a new Democratic seat in Harris County will necessarily result in the creation of two majority-minority opportunity districts for Hispanics and African-Americans, respectively. The evidence will also show that traditional redistricting principles, like compactness, contiguity, respect for political subdivisions and communities of interest, were not subordinated to considerations of race. Finally, the evidence will show that, to the extent the Legislature was cognizant of race, it was permissibly so to ensure that Plan 1374C did not violate either Section 5 or Section 2 of the Voting Rights Act.

Plan 1374C is also not an unconstitutional political gerrymander. The standards for claims of political gerrymandering were set out in *Davis v. Bandemer*, 478 U.S. 109 (1986), and Plaintiffs cannot meet the *Bandemer* test. The evidence cannot support a violation under *Bandemer* because there is no consistent pattern of dramatically disproportionate election losses for Democrats, because Plan 1374C reflects the statewide voting patterns of Texas voters, and because there is no evidence that Democrats have been excluded from the political process as a whole to justify court intervention rather than political self-help.

Finally, Plan 1374C does not violate Section 2 of the Voting Rights Act. The districts under Plan 1374C achieve a "rough proportionality" between the percentage of minority districts and the statewide minority percentages, which is in and of itself sufficient to defeat a Section 2 claim. *Johnson v. DeGrandy*, 512 U.S. 997, 1023 (1994). Moreover, the Court in *Balderas* expressly rejected nearly identical §2 claims because Plaintiffs did not meet the three-part test under *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). The evidence will demonstrate that Plaintiffs still cannot satisfy the *Gingles* test.

ARGUMENT

I. THE RACIAL GERRYMANDERING CLAIMS ARE NOT SUPPORTED BY THE LAW OR THE FACTS OF THIS CASE.

A. The Law Pertaining to Claims of Racial Gerrymandering.

In *Shaw v. Reno*, the United States Supreme Court held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state

redistricting plan, on its face, lacks any rational explanation other than that it is an effort to separate voters on the basis of race. 509 U.S. 630, 649 (1993). However, it is not enough if race is merely a motivation for the drawing of a majority-minority district. *Bush v. Vera*, 517 U.S. 952, 959 (1996). For strict scrutiny to apply, traditional redistricting criteria must be subordinated to race. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The U.S. Supreme Court has made clear that there is nothing illegal or unconstitutional about a legislature taking race into account when drawing majority-minority districts, as long as race is not the predominant factor motivating the legislature's redistricting decisions. *Bush v. Vera*, 517 U.S. at 962. And the burden of proof is on the Plaintiffs and Intervenors in this case to show that a facially neutral law is unexplainable on grounds other than race. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).

Where, as here, there exists a legitimate political explanation for the Legislature's redistricting decisions, the Court must exercise extraordinary caution in reviewing claims of racial gerrymandering, particularly when the voting-age population of a challenged district is one in which race and political affiliation are highly correlated. *Easley*, 532 U.S. at 242. Hence, the Texas Legislature—by placing reliable Democratic precincts within a particular district, irrespective of their race—may end up with districts containing more heavily African-American

or Hispanic precincts, and the legislative motives would be political, rather than racial. *Id*. at 245.

The Plaintiffs and Intervenors bear the burden of proving that race was the predominant factor motivating the Texas Legislature's decision to place a significant number of voters within or without a particular district. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The race-based motive may be shown either through circumstantial evidence of a district's shape and demographics, or through more direct evidence of legislative purpose. *See id*. To make a circumstantial showing, Plaintiffs and Intervenors must prove that the Texas Legislature subordinated traditional race-neutral principles, including, but not limited to, compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. *See id*. But where, as here, the State can show that political concerns and other race-neutral considerations are the basis for redistricting legislation—and that those considerations were not subordinated to race—a plaintiff's claim of racial gerrymandering must fail. *See Shaw*, 515 U.S. at 647; *see also Hunt v. Cromartie*, 526 U.S. 541 (1999).

B. The Facts Demonstrate That No Racial Gerrymandering Occurred.

Plaintiffs cannot prove an unconstitutional racial gerrymander, for at least seven independent reasons. *First*, and most fundamentally, Plaintiffs cannot demonstrate that race—and not politics or other traditional redistricting criteria—predominates as the basis of the congressional lines drawn in Plan 1374C.

Second, Plaintiffs cannot demonstrate that the shapes of districts in Plan 1374C are so bizarre or irregular as to raise an inference of racial gerrymandering. *Third*, a *Cromartie* analysis will demonstrate that political affiliation, and not race, explains the decisions to draw the lines in the challenged districts. *Fourth*, the Court in *Balderas* expressly endorsed the legal authority of the Legislature to draw districts almost identical to the districts the Legislature in fact drew in 2003. *Fifth*, Plaintiffs' own expert testified in *Balderas* that the districts at issue are not racial gerrymanders. *Sixth*, to the extent the Legislature did consider race, it did so in the legally permissible manner specifically to ensure that the congressional redistricting plan did not run afoul of Section 5 of the Voting Rights Act. And *seventh*, the Legislature's drawing of lines in Plan 1374C is further justified to avoid any possible liability for the State under Section 2 of the Voting Rights Act, if over time—as some Plaintiffs alleged in *Balderas*—drawing of additional majority-minority districts became required by federal law.

1. Plaintiffs cannot prove that race predominated.

Plaintiffs' burden is to prove that Plan 1374C has no other rational explanation other than as an effort to separate voters based on race, and that race predominated over politics and other traditional redistricting factors. *Shaw*, 509 U.S. at 649; *Vera*, 517 U.S. at 959; *Miller*, 515 U.S. at 916. Plaintiffs cannot meet this burden.

The evidence at trial will prove that the predominant goal of the Texas Legislature in adopting Plan 1374C was political: increasing the number of

Republican-leaning congressional districts in order to more accurately reflect the voting patterns in the State of Texas. In addition to politics, the evidence will demonstrate that the Legislature relied upon numerous other traditional redistricting principles, including maintaining county lines, compactness and contiguity, and preserving communities of interest. Although the Legislature was certainly cognizant of race—as it must be under the Voting Rights Act—Plaintiffs cannot prove that race was the predominant factor in drawing the lines under Plan 1374C.

2. Plaintiffs cannot demonstrate that the district shapes in Plan 1374C are so bizarre or irregular as to raise an inference that the only rational explanation is racial gerrymandering.

In prior racial gerrymandering cases, the Supreme Court has looked to the overall shape of challenged districts and, in extraordinary cases, has found that some districts were drawn with such bizarre and irregular lines that it raised an inference that the only rational explanation was racial gerrymandering. *See, e.g.*, *Shaw*, 509 U.S. at 649. Plaintiffs cannot demonstrate that in this case.

The districts in Plan 1374C are far more compact and much less irregular than other districts the Supreme Court has invalidated. Indeed, the districts that are the most irregular in 1374C are one protected under the Voting Rights Act and are largely carried over from the court-drawn map in Plan 1151C.

3. A *Cromartie* analysis will demonstrate that political affiliation, and not race, explains the decisions on where to draw the lines.

Under *Easley v. Cromartie*, 532 U.S. 234 (2001), even bizarre and irregular districts are permissible if it can be demonstrated statistically that partisan voting patterns, rather than race, determined which Voter Tabulation Districts (VTDs) were included in the districts and which VTDs were not. At trial, Plaintiffs cannot demonstrate that district lines were drawn according to race; to the contrary, a *Cromartie* analysis will demonstrate that political affiliation was the predominant factor in drawing the district lines.

4. This Court in *Balderas* expressly endorsed the legal authority of the Legislature to draw districts almost identical to the districts the Legislature in fact drew in 2003.

As this Court is aware, because of an increase in population in the State of Texas from 1990 to 2000, at the turn of the decade Texas was entitled to two additional districts, increasing its delegation to the United States Congress from 30 members to 32. Because neither the Texas Legislature nor the Texas Judiciary had drawn a plan by the federal court-imposed deadline, the three-judge federal panel was left with the "unwelcome obligation of performing in the legislature's stead." *Balderas v. Texas*, Civil A. No. 6:01-CV-158, slip op. (E.D. Tex. November 14, 2001) (per curium), *aff'd mem.*, 122 S.Ct. 2583 (2002). During the *Balderas* trial, Texas Attorney General John Cornyn sponsored Plan 1044C, dubbed the "Texas Plan." Conceptually, Plan 1044C created one additional performing African-

American district in Harris County (CD 25). Notably, CD 25 in the Texas Plan was taken verbatim from CD 25 in a proposed plan sponsored by the Texas Coalition of Black Democrats, known as Plan 1013C. During the *Balderas* trial, CD 25's configuration in both Plan 1013C and 1044C was defended and supported by attorney Morris Overstreet on behalf of his client, the Texas Coalition of Black Democrats.[1]

Once the State finished its proffer of the Texas Plan, additional testimony was adduced from the State's expert as to how a federal panel might draw its own plan.[2] The premise of this line of questioning was that any court-drawn plan—in contrast to a plan drawn by the Legislature—should be neutral and apolitical, leaving policy decisions belonging solely to the Legislature for a future round of redistricting.

During this line of questioning, the State suggested three things. First, the Hispanic districts exceeding 50% HVAP and the African-American districts

[1] In advocating the creation of a third African-American district in Harris County, Morris Overstreet's closing argument in the *Balderas* trial included the following statement: "But in this case, contrary to many other cases, the State of Texas does not oppose the creation of this district. In fact, the State of Texas through testimony in this courtroom and their own plan adopt and encourage this Court to create a third opportunity district." *See Balderas* trial transcript, November 2, 1001, Morning Session, Page 45, Lines 15-20. Plan 1374C, which is the newly-enacted congressional plan for 2003, contains a third performing African-American district. CD 9 in Plan 1374C has as its genesis CD 25 in the Texas Plan (Plan 1044C), offered by then-Attorney General John Cornyn on behalf of the State of Texas. CD 25 in the Texas Plan, in turn, was identical to CD 25 in Plan 1013C, offered by the Texas Coalition of Black Democrats.

[2] *See Balderas* trial transcript, November 1, 2001, Afternoon Session, Page 93, Line 5 to Page 109, Line 22.

exceeding 40% BVAP should be drawn first.[3] Thus, CD 15, 16, 18, 20, 23, 27, 28, 29 and 30 should be drawn first. Of those nine, eight districts were likely to elect a Democrat and one district was likely to elect a Republican. Second, provisions should be made for the addition of two new districts, and those districts should be placed in the areas of greatest growth over the decade.[4] Thus, one district should be drawn in the Dallas/Fort Worth area, which became CD 32, and the other district should be drawn in the corridor between Austin and Houston along Highway 290, which became CD 31. Both of these districts were likely to elect Republicans, because of the voter demographics in those urban areas. Third, the remaining 21 districts should be drawn in such a manner that was only necessary to equalize population, meaning that the number of partisan seats in these non-protected districts would remain intact.[5]

Thus, a plan drawn on these lines would create a likely partisan breakdown favoring Democrats, because it would preserve the salient features of the 1991 Martin Frost plan (as modified in 1996), meaning that all incumbents would be protected and the two new districts would likely elect Republicans. At the Court's request, the State provided such a plan, [6] which had the predictable consequence of

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[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] At Judge Higginbotham's request, the State undertook to draw such a plan overnight, with the understanding that the plan was not being sponsored by the State of Texas.

protecting incumbents and not increasing the number of Republican seats commensurate with the increase in Republican voting strength statewide.

The following day was the last day of the trial. Immediately prior to closing arguments, the State introduced two new congressional plans, Plan 1149C and Plan 1150C. Both plans were faithful to the Court's request to draw plans along the three-pronged approach detailed the day before, but Plan 1150C also attempted to draw an additional performing African-American district in Harris County (as had been requested by Morris Overstreet on behalf the Texas Coalition of Black Democrats and as had been done in the Texas Plan).[7]

After the close of evidence in the *Balderas* trial, the three-judge federal panel redrew Texas's congressional districts and issued its opinion and judgment on November 14, 2001. That new plan was named Plan 1151C, which was the next number available for public plans within the Texas Legislative Council's RedAppl 2001 computer program.

The three-judge federal panel rejected the required drawing of additional majority-minority districts. *Finding that judicial redistricting was inherently different from legislative redistricting*, the panel concluded as follows:

> "*Various parties urged us to create both African-American and Latino minority districts. These districts are not required by law, as discussed in*

See Balderas trial transcript, November 1, 2001, Afternoon Session, Page 109, Line 23 to Page 110, Line 22.

[7] *See Balderas* trial transcript, November 2, 2001, Morning Session, Page 6, Line 3 to Page 8, Line 11, and Page 112, Line 21 to Page 113, Line 11.

> *more detail below, but could be created by the State so long as race was not a predominant reason for doing so*. Whether to do so is, however, a quintessentially legislative decision, implicating important policy concerns.

See Balderas, op. at 9-10 (citations omitted) (emphasis added). Moreover, the three-judge federal panel opined that: "The matter of creating such a permissive district is one for the legislature. As we have explained, such an effort would require that we abandon our quest for neutrality in favor of a raw political choice."[8]

Taking the Court's comments to heart, the State of Texas enacted Plan 1374C. This new plan, without allowing race to serve as a predominant factor, accomplishes Texas's stated public policy goal of better reflecting current voting patterns in the State. It also accomplishes the State's stated public goal from 2001 of creating an additional African-American opportunity district and an additional Hispanic opportunity district.[9]—namely, CD 9 in Houston, Harris County and CD

[8] *See Balderas*, op. at 13 (footnote omitted).

[9] Multiple parties, including the State of Texas, requested the three-judge federal panel in the *Balderas* trial to consider drawing an additional Hispanic opportunity district. None of the parties was able to demonstrate that such a majority-minority district was required to be drawn, although several litigants in the *Balderas* trial contended that a functioning district could permissively be drawn along the border of the Rio Grande Valley. During the 2003 redistricting cycle, additional requests were made to draw an additional Hispanic opportunity district along the border. Plan 1374C built upon these ideas, culminating in a new plan which was able to draw an additional Hispanic opportunity district in this region by splitting Webb County and crafting another district that runs south to north, as do the existing Hispanic districts in 1151C.

25 in the lower Rio Grande Valley, running south to north from Hidalgo County up to Travis County.[10]

5. Plaintiffs' own expert testified in *Balderas* that the districts at issue are not racial gerrymanders.

During the last day of the *Balderas* trial, the State of Texas's then-expert witness Dr. John Alford testified as to the legality and suitability of the Texas Plan.[11] In an expert report, and under oath in deposition and at trial, Dr. Alford specifically defended the Texas Plan's CD 25, which corresponds to the new African-American opportunity district in Harris County, as legally permissible. Dr. Alford also explained that this district was the result of traditional redistricting criteria, and was not a district in which race was the predominant factor in its configuration.

Now, two years later, the Jackson Plaintiffs have retained Dr. Alford as their expert. And his *Balderas* testimony remains true: Plan 1044C's CD 25—very similar to Plan 1374C's CD 9—is not a racial gerrymander.

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[10] Due to the lower rates of citizenship among Hispanics in the Dallas/Fort Worth region, the Court concluded that a performing Hispanic opportunity district could not be drawn in that area, and that no legal obligation existed to do so. Nor did the Court find any obligation to draw a Hispanic opportunity district along the lower Rio Grande Valley. The Texas Legislature, however, in enacting Plan 1374C, chose to draw CD 25, which is a majority-minority Hispanic opportunity district in the lower Rio Grande Valley, running from Hidalgo County up to Travis County. Citizenship rates are higher in this region and, because of the significant percentages of HVAP and SSRV in this district, CD 25 will likely elect Hispanics' candidate of choice.

[11] *See Balderas* trial transcript, November 1, 2001, Afternoon Session, Page 80, Line 19 to Page 115, Line 15.

6. To the extent the Legislature did consider race, it did so in the legally permissible manner specifically to ensure that the congressional redistricting plan did not run afoul of Section 5 of the Voting Rights Act.

The Supreme Court's racial gerrymandering case law does not require that States be completely unaware of racial data when drawing district lines. And, for good reason: States must be cognizant of the racial breakdown of population and district data in order to comply with the Voting Rights Act. Texas is a covered jurisdiction under the Voting Rights Act, so any change in district lines must be precleared by the Department of Justice and, pursuant to Section 5 of the Voting Rights Act, cannot retrogress. The only way a State can reasonably determine if a proposed change retrogresses is to examine the data and run the statistical analysis to ascertain the new lines' impact on the ability of minority voters to elect their candidates of choice.

Plan 1374C has been referred to by members of the Texas Legislature as an "8-3" plan. The "8" refers to the number of districts containing 50% or greater HVAP, without regard to performance of the districts. These district numbers are 15, 16, 20, 23, 25, 27, 28 and 29. Of these 8 districts, CD 25 is a newly-created majority Hispanic district. The "3" refers to the 3 African-American districts in this plan, two of which have 40% or greater BVAP (CD 18 and CD 30), and the third district being a newly-created CD 9 with BVAP at 36.5%. Because of the lower citizenship rates of Hispanics in CD 18, 30 and 9, the effective percentages

of African-American voters allow them to dominate the primaries in these three districts.

The plan has five open seats, three of which are in majority-minority districts: CD 9, CD 25 and CD 29. The fact that these districts are open seats increases the likelihood that a true candidate of the minority communities' choice will be elected from these districts. Regression analysis demonstrates that CD 25 performs for Hispanic voters and new CD 9 performs for African-American voters. Regression analysis also demonstrates that all of the other majority-minority districts will perform in the same manner that each district has performed in the benchmark plan.

Although politics predominated in the drawing of Plan 1374C, the Legislature also had to remain conscious of how particular changes might affect compliance with Section 5 of the Voting Rights Act. For example, CD 23 was reconfigured to increase the Republican index in that district so that incumbent Henry Bonilla's chances of reelection were improved. In order to avoid potential retrogression under Section 5 of the Voting Rights Act, a new Democratic-majority Hispanic opportunity district (CD 25) was created. The creation of CD 25 in turn affected current districts 27, 28, and 15. Furthermore, CD 24 (Martin Frost) was dismantled and made into a Republican-leaning district. In order to avoid potential retrogression, a new Democratic performing African-American opportunity district (CD 9) was created in Harris County.

It cannot be disputed that the Legislature was aware of race when drawing the lines; nor can it be disputed that the Legislature sought to avoid violating Section 5 of the Voting Rights Act. But, critically, that mere awareness is *not* what the Supreme Court has found to violate the Equal Protection Clause. Were it otherwise, Section 5 of the Voting Rights Act would be rendered utterly inoperative. Instead, the Supreme Court has held that the Equal Protection Clause is violated only when race predominates over all other factors. That did not happen with Plan 1374C.

7. The Legislature's drawing of lines in Plan 1374C is further justified to avoid any possible liability for the State under Section 2 of the Voting Rights Act, if over time—as some Plaintiffs alleged in *Balderas*—drawing of additional majority-minority districts became required by federal law.

The State Defendants do not believe that the drawing of any additional majority-minority districts is required under Section 2 of the Voting Rights Act. *See* Part III, *infra*. Plaintiffs in the *Balderas* litigation brought precisely such a claim (which this Court rejected). Plaintiffs in this litigation continue to press that claim. In drawing Plan 1374C, the Legislature was legally entitled to consider the possibility that the State would again be sued under Section 2 of the Voting Rights Act (as in fact has been in this litigation) and to act in order to avoid any possibility of liability.

* * * * *

Plaintiffs bear the burden to prove that Plan 1374C is an unconstitutional racial gerrymander. Each of the aforementioned seven reasons is an independent, sufficient reason why Plaintiffs cannot carry their burden.

II. THE PARTISAN GERRYMANDERING CLAIMS ARE UNSUPPORTED IN THE LAW AND CANNOT BE ESTABLISHED ON THESE FACTS.

Plaintiffs' partisan-redistricting claims fall short of the exacting test set down by the Supreme Court in *Davis v. Bandemer*. Although Plaintiffs assert that their allegations could survive dismissal under *Bandemer*, district courts have not hesitated to dismiss similar claims—and consistently have been summarily affirmed in doing so. Plaintiffs focus on transitory election outcomes rather than the kind of structural barriers to political success that the *Bandemer* Court required. Indeed, even under their own proposed and supposedly more lenient *Vieth* standard—which no court has yet adopted, even in part—Plaintiffs would still lose on the facts in this case.

A. The *Bandemer* Test for Unconstitutional Partisan Gerrymandering Is the Controlling Law and Sets a High Threshold That Plaintiffs Cannot Meet.

Plaintiffs allege that the Texas redistricting meets the test set out in *Davis v. Bandemer* for an unconstitutional partisan gerrymander. As a matter of law, Plaintiffs are incorrect. The *Bandemer* test is by design hard to meet, and "[i]n the 17 years since the *Bandemer* decision, no congressional or state-legislative districting plan has been invalidated as a partisan gerrymander." *See* "Firm Files Reply Brief in Upcoming Redistricting Case Before High Court," *available at*

http://www.jenner.com/news/news_item.asp?id=12249825. In those nearly two decades, district courts have typically granted summary judgment against such claims, *e.g.*, *Terrazas v. Slagle*, 821 F. Supp. 1162, 1174-75 (W.D. Tex. 1993) (per curiam), or have dismissed those claims outright because they focused on short-term election results rather than the political process as a whole, *e.g.*, *O'Lear v. Miller*, 222 F. Supp. 2d 850, 859 (E.D. Mich.), *aff'd*, 537 U.S. 997 (2002); *Pope v. Blue*, 809 F. Supp. 392, 397 (W.D. N.C.), *aff'd*, 506 U.S. 801 (1992); *Badham v. Eu*, 694 F. Supp. 664, 671 (N.D Cal. 1988), *aff'd*, 488 U.S. 1024 (1989). This case warrants the same result.

In *Bandemer*, Justice White wrote for a plurality of four Justices,[12] holding that mere partisan intent was not enough to make a *prima facie* case under the Equal Protection Clause, but rather that there must also be a "threshold showing" of "effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions." *Bandemer*, 478 U.S. at 133-34 & n.14. In *Bandemer*, only two Justices in dissent would have held that mere partisan intent could make a *prima facie* case of partisan gerrymandering such that the State would have show a sufficient state interest. *Id.* at 184 (Powell, J. concurring in part and dissenting in part, joined by Stevens, J.).

[12] Lower courts have applied the principle announced in *Marks v. United States*, 430 U.S. 188, 193 (1977), to hold that the analysis contained in the plurality opinion of Justice White controls claims of partisan gerrymandering. *See, e.g.*, *O'Lear*, 222 F. Supp. 2d at 845-55 & n.2; *Terrazas*, 821 F. Supp. at 1172 & n.12. And Justice White's formulation of the test—specifically the requirement for an unconstitutional "effect"—cannot be met by Plaintiffs.

1. The "intent" prong of *Bandemer* is not in dispute.

"As long as redistricting is done by a legislature," Justice White's opinion explained, the *Bandemer* intent prong is "not very difficult to prove." 478 U.S. at 128. The Supreme Court has, in other cases, repeatedly acknowledged the role of politics and partisanship in congressional redistricting. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 739 (1983) ("We have never denied that apportionment is a political process . . . ."); *see also Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (holding that a legislature could "engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if those responsible for drawing the district were *conscious* of that fact") (emphasis in original).

There is no serious dispute in this litigation that the 2003 congressional redistricting was motivated by a desire to achieve political gains. Therefore, State Defendants respectfully suggest that taking evidence at trial on the intent element of *Bandemer* is unnecessary—for the Court, the parties, or the witnesses involved. Nothing will be gained from extensive testimony that the politicians who engaged in redistricting were acting like politicians, that Republicans sought to elect more Republicans and Democrats sought to retain more Democrats. That much is obvious. Accordingly, State Defendants would be willing to enter an appropriate stipulation that Plan 1374C meets the "intent" element as formulated in *Bandemer*, eliminating any rationale for cumulative trial testimony on this point.

2. The "effect" prong of *Bandemer* is not met because Plan 1374C reflects the voting trends in Texas and does not impede Plaintiffs' access to the political process as a whole.

To show "discriminatory effect," *Bandemer* requires proof of both: (1) "an actual or projected history of disproportionate results" and (2) "that 'the electoral system is arranged in such a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Terrazas*, 821 F. Supp. at 1172 (citing *Davis v. Bandemer*, 478 U.S. at 132); *see also O'Lear*, 222 F. Supp. 2d at 855 (same). Plaintiffs have demonstrated neither.

a. The "projected history" of congressional election results for Texas is not disproportional in the sense discussed in *Bandemer* because it reflects the voting trends of Texans.

On the first aspect of *Bandemer*'s "effect" prong, Plaintiffs have failed to show that the election results under Plan 1374C will be disproportional in the sense contemplated by *Bandemer*. Mere disproportionality is not sufficient to show an unconstitutional effect under *Bandemer*. Indeed, in any district-based congressional election system, it is to be expected based on different voting patterns in different districts. *Bandemer*, 478 U.S. at 130-31 (disproportionate outcomes are "inherent in winner-take-all, district-based elections"); *see also id.*, 478 U.S. at 131 ("[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm."); *see also Martinez v. Bush*, 234 F. Supp. 2d 1275, 1348 (S.D. Fla. 2002) ("Notwithstanding the plaintiffs' and intervenors' contention, disproportionate

representation—no matter how severe—cannot by itself rise to the level of an equal protection claim.").

Plaintiffs claim that this element can be satisfied by showing what they call a "majoritarism" rather than proportionality. In conclusory form, the Jackson Plaintiffs' complaint alleges "[t]he 2003 redistricting map is an intentional partisan gerrymander that thwarts majority rule and is an affront to basic democratic values . . . ." Jackson Am. Compl. ¶71. The report of Plaintiffs' expert expands on this concept of "majoritarianism." Dr. Alford explains his method of "normalizing" election results by looking at a statewide result—say, the 58.9% major-party vote for Bush in the 2000 Presidential election—and then determining what percentage shift in party preferences would be necessary to reduce that margin to a perfect 50-50 tie. In that example, the number would be 8.9%. To "normalize" each congressional race, then, Dr. Alford "adjust[s] all the precinct results down" by that same margin.[13] *See* Alford Rep. at 21-22 (giving this example). Dr. Alford's conclusion is that Plan 1374C has too much "packing and cracking" of partisan voters because, by his analysis, at a 50-50 split (normalized using his assumptions), the projected congressional breakdown would, depending on the

[13] This simple arithmetic method, of course, employs unrealistic and rigid assumptions about how voting patterns in Texas are likely to change. The first assumption is that there is likely to be a new Democratic majority in Texas in the near term. The second assumption is that those "new" Democratic votes will be perfectly evenly spread among the State's 32 very different congressional districts. Plaintiffs have offered no support for these artificial assumptions.

particular statewide election used as a proxy, be as much as 22 Republican seats and 10 Democratic seats.[14] *See* Alford Rep. at 23.

But to succeed on a *Bandemer* claim—whether based on actual or projected election results—Plaintiffs must prove that the harm they will suffer is real. As Justice White stated in explaining the *Bandemer* test: "Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step toward that end, which would be so much at odds with our history and experience." 478 U.S. at 133-34; *see also id*. at 139.

There is no reason to think that there will ever be cognizable "harms" arising from Plan 1374C that would make judicial intervention under *Bandemer* appropriate. First, there is cause to doubt that Plan 1374C will yield as significant a shift in the congressional delegation as Plaintiffs speculate. What the plaintiffs in *Vieth* told the Supreme Court in this regard on November 19 is instructive. In a discussion of the *Balderas* map, the *Vieth* plaintiffs stated that Plan 1151C had been expected to yield 17 or 18 Republican seats and only 14 or 15 Democratic

[14] This proffered evidence merely echoes Plaintiffs' complaints that Texas Democrats have been "packed" on partisan lines into a small number of districts. Those 10 "Democratic" districts under Plan 1374C, however, also happen to all be districts protected under the Voting Rights Act. There is thus a serious tension between Plaintiffs' demands that the Voting Rights Act be strictly followed, *e.g.*, Jackson Compl. ¶¶ 65, 75, 77, and Plaintiffs' demands that Democratic voters be "unpacked." *See also* B.3, *infra.*

seats. *See* Appellants' Reply Brief at 14 n.6 (*Vieth v. Jubelirer*)[15]. In fact, the opposite happened: Democrats carried 17 seats while Republicans carried 15 seats, despite winning every statewide office by a comfortable margin. *See* www.sos.state.tx.us/elections/historical/. The explanation is the power of incumbency. *See* Gaddie Dep. 52:5-52:14.

For the same reason, the State's expert Dr. Gaddie testified that he expected the net gain for Republicans under Plan 1374C to be only three or four seats—not the seven seats predicted in the press by the Plaintiffs—because of the incumbency advantages held by current Democratic congresspersons. *See* Gaddie Dep. 54:22-55:3. To whatever extent Plan 1374C was drawn to overcome those incumbency advantages—by creating open seats in which the voters could choose between two fresh faces—only improves the "responsiveness" of the map by allowing voters' preferences to be expressed without the distorting influence of incumbent power. *See* Gaddie Dep. 52:15-25.

Second, Plaintiffs' rhetoric about "majoritarianism" fails for a very simple reason: At present, there is no Democratic "majority" in Texas. With no "majority," there is no inconsistency between the results of Plan 1374C and the principle of "majoritarianism."[16] *See* Appellants' Reply Brief at 7; *see also*

[15] The briefs cited herein from *Vieth v. Jubilerer* are presently available through Jenner & Block's firm website, at www.jenner.com/news/news_item.asp?id=12249825.

[16] This notion of a "majority" of a State's congressional delegation is a highly artificial construction that matters more to leaders of the national political parties than to the individual voters whose rights are being asserted here. A State's congressional delegation does not itself "rule" the State, but instead merely comprises a small part of a

Bandemer, 478 U.S. at 129-30 (noting that the Constitution does not require proportionality). Plaintiffs' complaint therefore cannot be with the projected results of Plan 1374C. As the plaintiffs in *Vieth* put it: "If, in a given year, Republican candidates run strong campaigns and thereby attract additional support from the electorate, they could receive 55 percent of the vote statewide, yet walk off with 100 percent of the seats, while Democrats (with 45 percent of the vote) would win nothing. Although far from proportional representation, *this result is fully compatible with majoritarianism.*" Appellants' Reply Brief at 7 (*Vieth v. Jubelirer*) (emphasis added).

Indeed, Plaintiffs' arguments are carefully couched in "ifs" and hypotheticals, implicitly conceding that there is no evidence of any such Democratic "majority" today. *E.g.*, Jackson Pl. Opp. to Mot. to Dismiss at 6-7 (assuming such hypotheticals as "[e]ven *if* Democrats . . . won half the vote statewide," and "*if* Democrats in Texas won a narrow majority of the vote statewide" they would not carry a majority of the congressional seats) (emphasis added). By contrast, in other *Bandemer*-type cases—as in *Vieth*—the plaintiffs typically alleged that they represented a "majority" of the State's electorate that was being frozen out of the process. *See Bandemer*, 478 U.S. at 134; *O'Lear*, 222

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national assembly. While the language of "majority rule" has resonance when analyzing state-legislative districts that actually elect the leaders of a particular state, it has little application to the analysis of individual congressional districts where what matters is whether the individual congressperson represents their district. *See Bandemer*, 478 U.S. at 131-32 (explaining that citizens who vote for the losing candidate are "usually deemed to be adequately represented by the winning candidate").

F. Supp. 2d at 853; *Terrazas*, 821 F. Supp. at 1174; *see also* Brief of Appellants at 43, 49 (*Vieth v. Jubelirer*).

Given that no election has yet taken place under Plan 1374C—and that there is no indication that any Democratic "majority" exists in Texas even possibly to be thwarted by the new map—it is simply too soon for courts to evaluate whether the map has any sort of disproportional "effect" under *Bandemer*. *See White v. Alabama*, 867 F. Supp. 1571, 1577 (M.D. Ala. 1994) ("[One candidate's] lack of success is not enough to suggest that future Republican appointees will be unable to achieve statewide election. In light of increasing Republican success in the political process as a whole, the intervenor's claim is premature.").

Nor does Plaintiffs' evidence show the contrary. Plaintiffs assert that their expert Dr. Alford has analyzed 64 statewide races and that these data show that some hypothetical Democratic majority—with new voters spread perfectly evenly among 32 districts—might in 2004 be unable to elect a majority of the delegation. *See* Jackson Pl. Opp. to Mot. to Dismiss at 9. But, on examination, Plaintiffs' evidence does not advance their legal argument. First, although it uses a variety of historical data, it remains a static analysis that does not take into account the changing political tide of the State. Indeed, the data presented by Dr. Alford vividly illustrate that between 1992 and 2002, the overall pattern of voting in Texas has become decidedly more Republican. *Compare* Alford Report Table 1 at 34 *with* Alford Report Table 2 at 35. Second, this analysis simply cannot accurately translate statewide numbers into congressional races. Indeed, Dr.

Alford's analytic techniques—even as applied here—entirely failed to predict the results of the 2002 elections, because that analysis is inconsistent with the Democratic Party carrying 17 of the 32 congressional seats. *See* Alford Rep. at 40 (Graph 1) (showing that for a majority Republican vote under Plan 1151C, a majority of the delegation is predicted). That failure of prediction shows the wisdom of waiting for actual election returns to assess any theoretical "partisan" effect. And third, this analysis does not purport to indicate that the Democratic Party actually *will* carry a majority of the vote in 2004 or beyond. Rather, Dr. Alford speaks only to the hypothetical case. But since Plaintiffs' claims have no foundation in the current trendline of Texas politics, this purely academic hypothesis is not ripe for the courtroom.

b. Plaintiffs fail *Bandemer*'s "effect" prong because there is no institutional barrier to improving their party's position in future congressional redistricting by improving their performance in Texas's state-level elections.

Since *Bandemer*, the "effect' prong has had a second requirement: that plaintiffs show that the supposed "disproportionality" will persist despite plaintiffs' best efforts to improve their position through the State's political process as a whole. Plaintiffs have not even tried to make that showing, rendering their Complaint appropriate for dismissal as a matter of law.[17] *See, e.g.*, *O'Lear v.*

[17] In their opposition to the Motion to Dismiss, the Jackson Plaintiffs suggest that their amended complaint "repeatedly alleges that Plan 1374C will deprive Democratic voters—especially African-American and Hispanic Democrats—of the opportunity to 'participate in the political process' on an equal footing with Anglo Republicans." Jackson Pl. Opp. to Mot. to Dismiss at 9. This argument conflates Plaintiffs' race-based gerrymandering claims with their partisan gerrymandering claims. But as the Supreme

Miller, 222 F. Supp. 2d 850, 859 (E.D. Mich.) (per curiam), *aff'd* 537 U.S. 997 (2002); *Pope v. Blue*, 809 F. Supp. 392, 397 (W.D. N.C.), *aff'd* 506 U.S. 801 (1992); *Badham v. Eu*, 694 F. Supp. 664, 671 (N.D Cal. 1988), *aff'd* 488 U.S. 1024 (1989).

Bandemer held that a showing of "unconstitutional discrimination" requires proof that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." 478 U.S. at 132. The focus is on the *institutions* of the State and whether plaintiffs—through the normal political process—will be able to improve their position. *O'Lear*, 222 F. Supp. 2d at 856 (explaining that the test requires "some substantial permanency to the arrangement that cannot be overcome through the political process"). Thus, in *Bandemer*, the Supreme Court criticized the plaintiffs' short-term focus because it did not account for the possibility that they could improve their relative political strength over the coming years to better position themselves for the next state-level redistricting process. 478 U.S. at 135-36. The Plaintiffs here similarly fail to allege that they will be powerless in the next congressional redistricting or that they cannot grow in strength through the normal state-level political processes. Moreover, Plaintiffs' exclusive focus on

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Court has stated, it is proper to consider political affiliations in redistricting even if those political affiliations also correspond to race. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *see also Hunt v. Cromartie*, 526 U.S. 541, 546, 550 (1999). And mere boilerplate unfocused on *institutional* barriers has been rejected by courts. *See Badham v. Eu*, 694 F. Supp. 664, 672 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024. Nothing suggests that Plaintiffs, of whatever race or party, cannot improve their political standing over time through the normal state political process.

congressional redistricting as opposed to the broader "political process as a whole" is insufficient under *Bandemer*. *See Pope v. Blue*, 809 F. Supp. 392, 397 (W.D. N.C.) ("[U]nder the requirements of *Bandemer* for showing discriminatory effect, the plaintiffs must show that they have been or will be consistently degraded in their participation in the entire political process, not just in the process of redistricting."), *aff'd*, 506 U.S. 801 (1992).

Indeed, Plaintiffs' core argument has already been applied to congressional redistricting in Texas, and rejected. In *Terrazas v. Slagle*, the Western District of Texas granted summary judgment against a claim by Republicans that the 1991 congressional redistricting map violated *Bandemer*. 821 F. Supp. 1162, 1175 (W.D. Tex. 1993). That court assumed as true that the plaintiffs had "made a sufficient showing of disproportionality respecting Texas congressional districts," *id.* at 1172, but still held that no *Bandemer* claim had been proven, *id*. at 1175. The court explained that:

> We think the true focus of the second prong of *Bandemer*'s effects test should be on analyzing the perpetuation of power within the structures of the state's political system. Therefore, the term "political process as a whole" means straightforwardly all the structures of the state governmental system . . . . Under this framework, a partisan group will have satisfied the second prong of the discriminatory effect requirement under *Bandemer* if it presents evidence of a group perpetuating its power through gerrymandering in one political structure *and that the wronged political group cannot over the long haul counteract this tactic through its influence in another relevant political structure or structures*.

Id. at 1174 (emphasis added). Thus, the court analyzed whether its plaintiffs (the Republicans) could position themselves to influence future congressional

redistricting plans. *Id.* The court noted that in Texas the governor and lieutenant governor are "elected statewide and thus not subject to gerrymandering" and that, "[i]n the past fifteen years, Republicans have twice been successful in electing a Republican governor who could exercise veto power over legislation including any apportionment plan." *Id.* The *Terrazas* court also noted that "there is no showing that the Texas House of Representatives is so gerrymandered that the Republicans for that reason have no chance of electing a fraction of the membership equivalent to the fraction of voters statewide who are Republicans." *Id.* at 1175 n.16. Here, too, the Democrats have been successful in electing governors—having had two governors in office in the past two decades and having held the lieutenant governorship (with its influence over the Texas Senate) as recently as 1998. *See* www.sos.state.tx.us/elections/historical/. Indeed, prior to 1998, the Democratic Party had held the lieutenant governorship for over 140 consecutive years. *See* http://www.lrl.state.tx.us/legis/leaders/ltgovbio.html. And here Plaintiffs have made no showing that the *state* legislative bodies are gerrymandered in such a way that they cannot gain control or a veto-upholding minority position in at least one of them; to the contrary, as recently as 2002 Democrats held a majority in the state House, notwithstanding strong Republican voting patterns. Thus, these Plaintiffs—like the plaintiffs in *Terrazas*—have failed to show that the institutions of the Texas state governmental system prevent them, over the long haul, from exerting their influence over the congressional redistricting process.

The wisdom of the *Terrazas* court's judicial restraint in 1993 has been further underscored by how events have unfolded in the past ten years. Within that decade, the "out" party—the Republicans—captured the governorship and both Houses of the Texas Legislature. Just as the *Terrazas* court predicted, through hard work the party whose *Bandemer* claim was rejected pulled itself up through the normal political processes of state government to a position to influence the next congressional redistricting. Judicial intervention in those normal political rhythms was not called for in *Terrazas*, and is equally uncalled for here.

B. The Supreme Court's Notation of Probable Jurisdiction in *Vieth* Does Not Change the Result in This Case.

Plaintiffs argue that the pendency of the *Vieth* case in the Supreme Court somehow saves their deficient claim under *Bandemer*. It does not. *Bandemer* remains the controlling law until the Supreme Court itself says otherwise. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) ("The trial court . . . was . . . correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent."). And even when the Supreme Court does decide *Vieth*, there is no indication that its decision will suggest any different result here.

1. Even under a *Vieth*-type test, Plaintiffs cannot prevail.

Even if the *Vieth* plaintiffs succeed in eliciting a new more lenient standard from the Supreme Court, there is no indication that such a test would help these Plaintiffs. The facts here are in many respects the polar opposite of the facts in

Vieth. In *Vieth*, the plaintiffs alleged that the redistricting map frustrates the will of an existing political majority of Democrats by electing a congressional delegation with a majority of Republican members. *See* Brief of Appellants at 43 (*Vieth v. Jubelirer*) ("In the five most recent statewide races combined, Democrats had averaged 50.1% of the major-party vote, and in the most recent congressional elections (in November 2000) they had garnered 50.6% of the major-party votes cast across the State."); *see also id.* at 49 (noting that the Democratic gubernatorial candidate "won the only statewide race in 2002 by more than nine percentage points"). Thus, on its facts *Vieth* concerns redistricting maps that actually frustrate the will of the current political majority by ensuring that more seats will be awarded to the minority party. Here, in contrast, the record is undisputed that the current political majority party in Texas is the Republican Party—the same party that Plaintiffs assert will likely receive a majority of the congressional delegation under Plan 1374C. Moreover, the trendline in Texas suggests that the State may well become even more Republican, certainly in the foreseeable short run. Thus, the "effect" of Plan 1374C is perfectly consonant with the will of Texas's voters, as expressed in their votes on statewide races.

Plan 1374C is thus a poor candidate for a *Vieth*-type challenge. Indeed, if any map would be subject to a *Vieth*-type challenge, it would be Plan 1151C, which perpetuated much of the 1991 partisan gerrymander and in 2002 elected a majority of Democratic congresspersons while Republicans received on average 55% of the statewide vote. *See* www.sos.state.tx.us/elections/historical/.

2. The Supreme Court may well decide that claims of excessive partisanship in congressional redistricting are nonjusticiable altogether.

Despite Plaintiffs' optimism that the Supreme Court might announce a new standard that charges courts with attempting to remove politics from redistricting, if anything, it is more likely that the Supreme Court will put an end to such claims entirely. Both sets of appellees before the Supreme Court in *Vieth* advance arguments that political gerrymandering claims are not justiciable. *See* Brief of Appellees at 39-50 (*Vieth v. Jubelirer*); Brief of Appellees Cortés and Accurti at 21-22 (*Vieth v. Jubelirer*). So, too, do a group of Alabama Democratic *Amici*, who argue that partisan concerns should not be elevated to a constitutional principle that would necessarily limit the ability of Congress or state legislatures to address other competing policy values such as racial equity. *See* Brief of Amici Curiae Leadership of the Alabama Senate and House of Representatives at 25, 30 (*Vieth v. Jubelirer*).

In the fragmented *Bandemer* decision, the Supreme Court was faced with a question of whether the partisan nature of a state-legislative redistricting map of state-legislative seats presented a political question. 478 U.S. at 114-15. The Supreme Court held that the claim was justiciable, in part because that inquiry did not require it to tread on powers delegated to any "coequal" branch of government. *Id.* at 123 (White, J.) ("Disposition of this question does not involve us in a matter more properly decided by a coequal branch of our Government.").

Congressional redistricting—as challenged here and in *Vieth*—turns this rationale on its head. Article I, §4 not only delegates redistricting power to the States, it also delegates a nearly coterminous power *to Congress* to "regulate" that redistricting. U.S. CONST. Art. I, §4. There is thus a "coequal" branch of the federal government charged with doing exactly what Plaintiffs (and the *Vieth* plaintiffs) urge the courts to do instead.

Moreover, of the Justices who opined in *Bandemer* that political gerrymandering claims are justiciable, only Justice Stevens still sits on the Court. Plaintiffs hypothesize that the Court noted probable jurisdiction in *Vieth* to open the floodgates to political gerrymandering claims, but it may well be that the Court did so instead to vindicate the wisdom of Justice O'Connor's concurrence in the judgment, joined by then-Chief Justice Burger and then-Justice Rehnquist, which would have held such claims non-justiciable.

Justice O'Connor's opinion laid out her view that "this enterprise [of involving the courts in these disputes over the partisan nature of redistricting] is flawed from its inception. The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment." *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring in the judgment). And the passage of 17 years since *Bandemer* may well have proven the wisdom of that view. At least as applied to congressional races—where a clear constitutional delegation is made to the Congress—the

legacy of *Vieth* may not be new life for widespread partisan-gerrymandering claims brought by Plaintiffs, but rather the elimination of such claims altogether.

3. A constitutional prohibition on political gerrymandering could undermine Section 5 of the Voting Rights Act.

Plaintiffs' argument that this political proportionality is required by the Constitution could have the pernicious effect of taking the ability to remedy other perceived wrongs out of the reach of Congress or the state legislatures. In particular, the most densely Democratic districts are often those that are protected majority-minority districts under Section 5 of the Voting Rights Act, to which Texas is subject.[18] By forcing the "unpacking" of such districts to achieve a more level distribution of partisan affiliation statewide, Plaintiffs' theory could threaten the continued viability of the Voting Rights Act.

The essence of this tension has been noted by the Alabama Democratic *Amici* in *Vieth*, who argue that these partisan claims should not be constitutionally justiciable to avoid such a conflict. *See* Brief of Amici Curiae Leadership of the Alabama Senate and House of Representatives at 25, 30 (*Vieth v. Jubelirer*). These *amici* explain the essential tradeoff between allowing partisan-gerrymandering claims and undermining the gains made by minority groups:

> This Court should be mindful of the potential conflict between the asserted rights of partisan elites and their supporters and the established rights of historically disadvantaged racial and ethnic minorities. This appeal does not present the question whether racial

[18] Pennsylvania—the jurisdiction with the redistricting plan challenged in *Vieth*—is not a Section 5 covered jurisdiction, but Texas is, and federal law protects approximately one-third of Texas's 32 districts.

> minorities may demand the creation of effective influence districts as a matter of statutory right; rather, it presents the question whether party partisans will be afforded constitutional rights that could trump both the statutory and constitutional rights of racial and ethnic minorities to participate equally in the political process and to negotiate influence districts that enhance their effective exercise of the electoral franchise. Perversely, such an anti-partisan gerrymandering rule would encourage the cracking of black influence districts, the repacking of majority-black districts and increased racial polarization of the electorate.

Id. at 4. Worse, the *amici* argue, elevating partisan concerns to constitutional status could sacrifice the long-term goals of eliminating racial inequality to transitory concerns about which of the two parties was currently in control:

> An historically entrenched minority, like African Americans in Alabama, likely would be the only enduring losers if this Court established a new constitutional rule that requires rough proportional representation between the two major parties. As history demonstrates, eventually Democrats and Republicans will swap places in the driver's seat of the legislature even without such a judicially enforced mandate. But the more nearly permanent racial and ethnic minorities would forever lose much of the leverage they recently deployed in Alabama to be part of the governing majority, because white partisans would not have as strong an incentive to join inter-racial coalitions.

Id. at 15-16. Similar concerns would no doubt be raised in Texas, where approximately one-third of Texas's 32 congressional districts presently enjoy Section 5 protection.

In response to this observed tradeoff, the *Vieth* plaintiffs concede that "the least competitive districts in general elections often are heavily minority districts that 'pack' African-American or Latino voters" and acknowledge the inverse relationship between protecting these minority districts and eliminating partisan

bias in congressional redistricting maps. *See* Appellants' Reply Brief at 18 (*Vieth v. Jubelirer*) ("Plans that reject racial segregation and enhance minority representation by 'unpacking' overwhelmingly minority districts are thus more likely to reduce partisan bias by also 'unpacking' Democratic voters."). Rather than run from this consequence, the *Vieth* plaintiffs suggest that perhaps this is a good thing because such "unpacking" might be preferable to the current strategy of majority-minority districts that predominates under the Voting Rights Act. *Id.* (citing *Georgia v. Ashcroft*, ___ U.S. ___, 123 S.Ct. 2498, 2511-17 (2003)). Of course, under the *Vieth* plaintiffs' proposed rule of law, "unpacking" of majority-minority districts could become a constitutional mandate as States struggled to achieve artificial measures of partisan equality at the expense of other values, such as those embodied in the Voting Rights Act.

III. PLAN 1374C DOES NOT VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT.

The United States Supreme Court crafted a three-prong threshold test for determining whether, under the totality of the circumstances, a state is *required* under §2 to create a majority-minority district. *See Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986). Briefly, the three prongs are: (1) whether the protected minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) whether the protected minority group is "politically cohesive"; and (3) whether the white majority voted "sufficiently as a bloc to enable it–in the absence of special circumstances . . . to defeat the

minority's preferred candidate." *Id.* In *Johnson v. DeGrandy*, 512 U.S. 997, 1000 (1994), the Supreme Court effectively added a fourth prong—proportionality. 512 U.S. at 1024. Plan 1374C demonstrates neither a lack of proportionality nor a need for additional minority districts under *Gingles*. Consequently, Plaintiffs cannot establish any violation of Section 2 of the Voting Rights Act.

A. Plan 1374 Provides Roughly Proportional Representation.

In *Johnson v. DeGrandy*, 512 U.S. 997, 1000 (1994), the Supreme Court recognized that "rough proportionality" was inconsistent with a claim of vote dilution under the Voting Rights Act. There, a group of Hispanic voters in Dade County, Florida, alleged that the state legislative districts in that county were malapportioned and failed to reflect recent changes in Florida's population. *Id*. Florida argued that its existing legislative districting plan allowed Hispanic voters to elect candidates of their choice in direct proportion to their share of Dade County's voting age population, thus barring a claim that the plan diluted Hispanic voting strength. *Id*. at 1006. The Supreme Court agreed, holding that even if plaintiffs could otherwise show vote dilution under the *Gingles* totality of the circumstances test, the State could still avoid §2 liability by showing that members of the protected minority group "can be expected to elect their chosen representative in substantial proportion to their percentage of the area's population." *Id*. at 1008.

Justice Souter, who delivered the opinion of the Court in *Johnson*, was careful to distinguish this notion of proportionality from §2's proportional representation clause.[6] As Justice Souter explained:

> "Proportionality" as the term is used [in this opinion] links the number of majority-minority voting districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2 . . . This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters . . . And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.

Id. at 1014 n.11 (citations omitted).

As *Johnson* illustrates, the State's policy of equal opportunity—as expressed in the concept of providing minority voters with the opportunity to elect candidates of their choice in proportion to the electorate as a whole—is a legitimate state goal. *See also Bush*, 517 U.S. at 992 (O'Connor, J., concurring); *id*. at 1046 (Souter, J., dissenting) (noting that the Court has never had to decide that compliance with § 2 is a compelling state interest, but that a majority of the Court have indicated that it is).

In Plan 1374C, the three African-American districts comprise 9.4% (3/32) of the districts. This is roughly comparable to the 11.7% that African-Americans

6. "Nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

make up of the State of Texas's voting-age population, and substantially above the 6.3% (2/32) that would be the case with only CD 18 and CD 30 in Plan 1151C. Similarly, Hispanics comprise 23% percent of Texas's citizen voting-age population,[19] and, under Plan 1374C, would have a majority of the population in 25% of the districts. Under the test set out in *Johnson*, these districts provide roughly proportional representation, and so, as a matter of law, Plan 1374C cannot violate Section 2.

B. Plaintiffs Cannot Establish that Additional Minority Districts Are Required to Be Drawn Pursuant to *Gingles*.

Under *Gingles*, plaintiffs may establish a Section 2 violation only if they can show that (1) the protected minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the protected minority group is "politically cohesive"; and (3) the white majority voted "sufficiently as a bloc to enable it—in the absence of special circumstances . . . to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. Plaintiffs must establish all three conditions; failing to meet even one of the three will extinguish a §2 claim. *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) ("[W]e conclude that plaintiffs have failed to establish a genuine issue of material fact on the first part of the *Gingles* analysis. Because all three conditions must be met to establish a vote dilution claim, it is unnecessary for us to evaluate the second and third elements of the test."). As of this writing, no

[19] *See Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) (holding that courts "must consider the citizen voting-age population" in evaluating the first *Gingles* factor).

plaintiff has even attempted to argue that all three *Gingles* factors have been met; instead, Plaintiffs have conclusorily alleged vague claims of vote dilution. If Plaintiffs attempt to prove a *Gingles* claim at trial, Defendants anticipate relying on expert testimony and historical election data to demonstrate the lack of voter cohesion and bloc voting.

Furthermore, a plaintiff must show that the minority group is "geographically compact," in order to establish Section 2 liability. See *Shaw*, 517 U.S. at 916. The evidence will demonstrate that no such district can be drawn in the Dallas/Fort Worth area. Indeed, the three-judge panel in the *Balderas* trial rejected the theory that, under the totality of the circumstances, a majority-minority Hispanic district was legally required to be drawn in that area, in part because of the low rates of citizenship of Hispanics in Texas, and in part because of the bizarre, race-predominated configurations that would be required to attempt to do so.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the State Defendants' Trial Brief has been sent to all counsel of record on the 3rd day of December, 2003.

_____
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